

MEMORANDUM

To: N.H. Supreme Court Advisory Committee on Rules

From: Subcommittee on Amendments to Criminal Rules of Procedure
Rule 12(a)(4) and (b)(4)(A)
N. William Delker, Chair

Date: March 8, 2022

Re: Agenda Item 2020-009: Recommendations regarding Amendments to N.H. Rules of Criminal Procedure 12 and Rule of Evidence 404(b)

OVERVIEW

At its December 18, 2020 meeting, the Advisory Committee on Rules considered a proposal from Attorney David Rothstein to amend N.H. Rule of Criminal Procedure 12 to require the State to provide notice of its intent to offer evidence of other bad acts of a defendant under Rule of Evidence 404(b).

The Committee received no public comment at the June 4, 2021 meeting. Nonetheless, the Committee noted several shortcomings in the proposal and voted to send the proposed amendment to subcommittee chaired by Judge Delker with Judge Garner and Attorney Charles Keefe as subcommittee members.

The subcommittee invited the Attorney General's Office to designate a prosecutor to provide the State's input on proposed changes. Assistant Attorney General Meghan Hagaman joined the subcommittee.

The subcommittee drafted a new version of N.H. R. Crim. P. 12 with timelines for Circuit and Superior Court. This proposal was submitted to the Advisory Committee for its September 10, 2021 meeting. The Committee voted to send the new proposal out for public comment at its December meeting.

At its December 10, 2021 public meeting, the Committee received no public comment. Before the Advisory Committee voted on the proposed amendments, Subcommittee Chair Judge Delker suggested that the Subcommittee draft commentary for the rule so that there was "legislative history" to explain the rule for future reference. This memo is submitted to the Advisory Committee to serve that purpose. The language of the proposed rule is appended to the end of this memorandum.

OVERVIEW OF THE ISSUE

The subcommittee agreed with Attorney Rothstein's original concerns that the current rules do not provide effective notice or deadlines relating to the introduction of Rule 404(b) evidence at trial. For example, in Circuit Court Rule 12(a)(2)(C) merely requires the State to give the defense notice of its intent to introduce Rule 404(b) evidence and provide access to discovery to support the Rule 404(b) evidence. The Circuit Court rule only applies to the State even though Rule 404(b) evidence may be introduced by either party. Moreover, the current rule does not require the State to articulate what non-propensity inferences make the Rule 404(b) evidence admissible at trial.

In Superior Court, Rule 12(b)(1)(F) has the same flaws as the Circuit Court rule. In addition, the Superior Court rule requires the State to provide notice of its intent to rely on Rule 404(b) evidence 45 days after arraignment. The subcommittee felt this was too early because few prosecutors were analyzing their case in this way that soon in the litigation process.

The subcommittee disagreed with Attorney Rothstein's proposal in three main respects. First, his proposal did not set sufficiently clear deadlines to be enforceable. Second, the subcommittee felt that the procedure for Rule 404(b) evidence was different in Circuit and Superior Court so that separate rules were needed for each venue. Third, the deadlines for use of Rule 404(b) evidence should apply to both the prosecution and defense since Rule 404(b) applies to both sides of a criminal case.

AMENDMENT TO RULE 12(a)(4): CIRCUIT COURT PRACTICE

The subcommittee agreed that a different rule was required for Circuit Court because trial litigation in Circuit Court is much less structured than in Superior Court. In addition, unlike jury trials in Superior Court, a Circuit Court judge decides both the pretrial motions and hears the trial evidence. As a result, the subcommittee felt that the current deadline of 14 days before trial for notice of intent to introduce Rule 404(b) evidence remains appropriate. The proposed amendment makes the following changes to existing Circuit Court practice:

1. The notice obligations apply to both parties;
2. The deadline may be waived for good cause shown;
3. The notice must be in writing; and
4. The notice must articulate the permitted purpose for which the proponent intends to offer the evidence and the reasoning that supports the purpose

The proponent of the Rule 404(b) evidence must provide the opposing party with discovery of the Rule 404(b) evidence at or before the notice of intent to introduce that evidence.

AMENDMENT TO RULE 12(b)(4)(A): SUPERIOR COURT PRACTICE

The proposed Superior Court Rule completely revamps the approach to Rule 404(b) evidence. The proposed amendment sets deadlines in relation to jury selection when the parties can reasonably be expected to begin trial preparation. The proposed rule is structured to provide sufficient notice so that the issues are resolved before the final pretrial conference.

Proposed Rule 12(b)(4)(A)(i) begins by requiring the proponent of Rule 404(b) evidence to give notice to the other side of its intent to use other bad act evidence together with the discovery of that Rule 404(b) evidence. As with the Circuit Court, the obligation applies to both the prosecution and defense. The notice must be in writing and articulate the legal reasoning for the introduction of such evidence. Under current practice some prosecutors provide a generic letter stating that the State may introduce Rule 404(b) evidence contained in discovery without identifying with particularity the evidence or the specific, non-propensity reason the Rule 404(b) evidence is admissible. It is the intent of the subcommittee that such a generic letter would not satisfy the notice requirements of the proposed rule.

The subcommittee set this written notice 60 days before jury selection to give the parties time to confer about the proposed evidence. Notice in advance in this form may avoid unnecessary motion practice if the parties can reach agreement on the issue.

Proposed Rule 12(b)(4)(A)(ii) requires the proponent to file a motion 45 days before jury selection. Requiring the proponent to file a formal motion, which articulates the legal basis for the introduction of Rule 404(b) evidence, will ensure that the matter can be addressed by the Court in a timely manner before trial.

Proposed Rule 12(b)(4)(A)(iii) is intended to address the situation where one party believes that certain evidence should be excluded under Rule 404(b), but no notice or motion has been filed by the other side under subparagraphs (i) or (ii). It is not uncommon for a proponent of evidence to conclude that the evidence is not evidence of other bad actions, but rather is intrinsic to the charged crime(s). In this situation, the proponent reasonably could take the position that notice and a motion are not required under subparagraphs (i) or (ii) because the challenged evidence is admissible under a theory other than Rule 404(b). If the opposing party disagrees and believes that challenged evidence falls under Rule 404(b), the party seeking to exclude the evidence must file a motion 30 days before jury selection to resolve the issue. The motion to exclude cannot generically seek to exclude "all Rule 404(b) evidence." Rather, the motion to exclude must specifically identify the evidence the party believes should be excluded as Rule 404(b) evidence.

The trial court can then determine if the challenged evidence is, in fact, intrinsic to the charges. If the trial court concludes that the evidence is actually Rule 404(b) evidence the court may exclude the evidence on the ground that the proponent did not comply with the notice and motion requirements of (i) and (ii). In deciding whether to

exclude Rule 404(b) evidence based on the proponent's failure to comply with the notice and motion requirements, the court may consider the strength of the argument that the evidence is intrinsic, whether the proponent of the evidence sought to shift the burden of filing a motion to exclude evidence to the opponent, and any other relevant factor.

The subcommittee is mindful that Rule 12(b)(4)(A) sets out a fairly complicated procedural framework for resolution of Rule 404(b) evidence. Nonetheless, the subcommittee felt that establishing a clear timetable for resolution of Rule 404(b) issues was important because the legal analysis is often complicated, the issue may require an evidentiary "clear proof" pretrial hearing, and, under existing practice, late or ambiguous disclosures often result in continuances or other trial disruptions.

PROPOSED AMENDMENTS TO N.H. RULE OF CRIMINAL PROCEDURE 12
N.H. SUPREME COURT ADVISORY COMMITTEE ON RULES
NOTICE OF DECEMBER 10, 2021 PUBLIC HEARING (APPENDIX C)

Amend New Hampshire Rule of Criminal Procedure 12 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

Rule 12. Discovery

(a) Circuit Court-District Division

(1) At the defendant's first appearance before the court, the court shall inform the defendant of his or her ability to obtain discovery from the State. Upon request, in misdemeanor and violation-level cases, the prosecuting attorney shall furnish the defendant with the following:

(A) A copy of records of statements or confessions, signed or unsigned, by the defendant, to any law enforcement officer or agent;

(B) A list of any tangible objects, papers, documents or books obtained from or belonging to the defendant; and

(C) A statement as to whether or not the foregoing evidence, or any part thereof, will be offered at the trial.

(2) Not less than fourteen days prior to trial, the State shall provide the defendant with:

(A) a list of names of witnesses, including experts and reports, and a list of any lab reports, with copies thereof, it anticipates introducing at trial; **[and]**

(B) all exculpatory materials required to be disclosed pursuant to the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including *State v. Laurie*, 139 N.H. 325 (1995)~~].~~; and

~~(C) notification of the State's intention to offer at trial pursuant to Rule of Evidence 404(b) evidence of other crimes, wrongs, or acts committed by the defendant, as well as copies of or access to all statements, reports or other materials that the State will rely on to prove the commission of such other crimes, wrongs or acts.~~

(3) Not less than seven days prior to trial, the defendant shall provide the State with a list of names of witnesses, including experts and reports, and a list of any lab reports, with copies thereof, the defendant anticipates introducing at trial.

(4) **[Except for good cause shown, not less than fourteen days prior to trial, a party seeking to offer evidence of other crimes, wrongs, or acts pursuant to**

Rule of Evidence 404(b), must provide the other party written notice of its intent to offer such evidence. The notice must articulate the permitted purpose for which the proponent intends to offer the evidence and the reasoning that supports the purpose. The party shall also provide access to all statements, reports or other materials that the proponent of Rule 404(b) evidence will rely on to prove the commission of such other crimes, wrongs or acts.]

[(5)] Sanctions for Failure to Comply. If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may take such action as it deems just under the circumstances, including but not limited to:

(A) ordering the party to provide the discovery not previously provided;

(B) granting a continuance of the trial or hearing;

(C) prohibiting the party from introducing the evidence not disclosed;

(D) assessing the costs and attorneys fees against the party or counsel who has violated the terms of this rule.

(b) *Superior Court.* The following discovery and scheduling provisions shall apply to all criminal cases in the superior court unless otherwise ordered by the presiding justice.

(1) *Pretrial Disclosure by the State.* If a case is initiated in superior court, the State shall provide the materials specified in RSA 592-B:6. In addition, within forty-five calendar days after the entry of a not guilty plea by the defendant, the State shall provide the defendant with the materials specified below. If a case is originated in circuit court-district division, within ten calendar days after the entry of a not-guilty plea by the defendant, the State shall provide the defendant with the materials specified below.

(A) A copy of all statements, written or oral, signed or unsigned, made by the defendant to any law enforcement officer or the officer's agent which are intended for use by the State as evidence at trial or at a pretrial evidentiary hearing.

(B) Copies of all police reports; statements of witnesses; and to the extent the State is in possession of such materials, results or reports of physical or mental examinations, scientific tests or experiments, or any other reports or statements of experts, as well as a summary of each expert's qualifications, with the exception of drug testing results from the New Hampshire State Forensic Laboratory, which shall be provided within ten court days from the date of indictment, or such other date as may be authorized in the dispositional conference order.

(C) The defendant's prior criminal record.

(D) Copies of or access to all books, papers, documents, photographs, tangible objects, buildings or places that are intended for use by the State as evidence at trial or at a pretrial evidentiary hearing.

(E) All exculpatory materials required to be disclosed pursuant to the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including *State v. Laurie*, 139 N.H. 325 (1995).

~~(F) Notification of the State's intention to offer at trial pursuant to Rule of Evidence 404(b) evidence of other crimes, wrongs, or acts committed by the defendant, as well as copies of or access to all statements, reports or other materials that the State will rely on to prove the commission of such other crimes, wrongs or acts.~~

(2) Pretrial Disclosure by the Defendant

Not less than sixty calendar days prior to jury selection if the case originated in Superior Court or not less than thirty calendar days prior to jury selection if the case originated in Circuit Court-District Division or, in the case of a pretrial evidentiary hearing, not less than three calendar days prior to such hearing, the defendant shall provide the State with copies of or access to all books, papers, documents, photographs, tangible objects, buildings or places which are intended for use by the defendant as evidence at the trial or hearing.

(3) Dispositional Conferences. The purpose of the dispositional conference is to facilitate meaningful discussion and early resolution of cases.

(A) Unless the State does not intend to make a plea offer, in which case it shall so advise the defendant within the time limits specified herein, the State shall provide a written offer for a negotiated plea, in compliance with the Victim's Rights statute, RSA 21-M:8-k, to the defense, no less than fourteen (14) days prior to the dispositional conference. The defense shall respond to the State's offer no later than ten (10) days after receipt.

(B) The judge shall have broad discretion in the conduct of the dispositional conference.

(C) The State, defendant, and defendant's counsel, if any, shall appear at the dispositional conference. The State and the defendant shall be represented at the dispositional conference by an attorney who has full knowledge of the facts and the ability to negotiate a resolution of the case. Counsel shall be prepared to discuss the impact of known charges being brought against the defendant in other jurisdictions, if any.

(D) If a plea agreement is not reached at the dispositional conference, the matter shall be set for trial. The court may also schedule hearings on any motions

discussed during the dispositional conference. Counsel shall be prepared to discuss their availability for trial or hearing as scheduled by the court.

(E) Evidence of conduct or statements made during the dispositional conference about the facts and/or merits of the case is not admissible as evidence at a hearing or trial.

(F) If the case may involve expert testimony from either party, both sides shall be prepared to address disclosure deadlines for: all results or reports of physical or mental examinations, scientific tests or experiments or other reports or statements prepared or conducted by the expert witness; a summary of each such expert's qualifications; rebuttal expert reports and qualifications; and expert depositions. Except for good cause shown, the failure of either party to set expert witness disclosure deadlines at the dispositional conference may be grounds to exclude the expert from testifying at trial.

(4) Exchange of Information Concerning Trial Witnesses

(A) [Except for good cause shown,

(i) not less than 60 days prior to jury selection, a party seeking to offer evidence of other crimes, wrongs, or acts pursuant to Rule of Evidence 404(b), must provide the other party written notice of its intent to offer such evidence. The notice must articulate the permitted purpose for which the proponent intends to offer the evidence and the reasoning that supports the purpose. The party shall also provide access to all statements, reports or other materials that the proponent of Rule 404(b) evidence will rely on to prove the commission of such other crimes, wrongs or acts.

(ii) not less than 45 days prior to jury selection, a party seeking to offer evidence of other crimes, wrongs, or acts pursuant to Rule of Evidence 404(b), must file a motion to admit such evidence. The motion must identify the evidence and articulate the permitted purpose for which the proponent intends to offer the evidence and the reasoning that supports the purpose.

(iii) not less than 30 days prior to jury selection, a party shall file a motion to exclude evidence it believes constitutes Rule 404(b) evidence if no motion to admit the evidence has been filed by the opposing party. A motion to exclude filed pursuant to this provision must identify with specificity the evidence the party seeks to be excluded under Rule 404(b).]

[(B)] Not less than twenty calendar days prior to the final pretrial conference or, in the case of a pretrial evidentiary hearing, not less than three calendar days prior to such hearing, the State shall provide the defendant with a list of the names of the witnesses it anticipates calling at the trial or hearing. Contemporaneously with the furnishing of such witness list and to the extent not already provided pursuant to

paragraph (b)(1) of this rule, the State shall provide the defendant with all statements of witnesses the State anticipates calling at the trial or hearing. At this same time, the State also shall furnish the defendant with the results of New Hampshire criminal record checks for all of the State's trial or hearing witnesses other than those witnesses who are experts or law enforcement officers.

~~(B)~~ **[(C)]** Not later than ten calendar days before the final pretrial conference or, in the case of a pretrial evidentiary hearing, not less than two calendar days prior to such hearing, the defendant shall provide the State with a list of the names of the witnesses the defendant anticipates calling at the trial or hearing. Contemporaneously with the furnishing of such witness list, the defendant shall provide the State with all statements of witnesses the defendant anticipates calling at the trial or hearing. Notwithstanding the preceding sentence, this rule does not require the defendant to provide the State with copies of or access to statements of the defendant.

~~(C)~~ **[(D)]** For purposes of this rule, a "statement" of a witness means:

(i) a written statement signed or otherwise adopted or approved by the witness;

(ii) a stenographic, mechanical, electrical or other recording, or a transcript thereof, which is a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of such oral statement; and

(iii) the substance of an oral statement made by the witness and memorialized or summarized within any notes, reports, or other writings or recordings, except that, in the case of notes personally prepared by the attorney representing the State or the defendant at trial, such notes do not constitute a "statement" unless they have been adopted or approved by the witness or by a third person who was present when the oral statement memorialized or summarized within the notes was made.

(5) *Protection of Information not Subject to Disclosure.* To the extent either party contends that a particular statement of a witness otherwise subject to discovery under this rule contains information concerning the mental impressions, theories, legal conclusions or trial or hearing strategy of counsel, or contains information that is not pertinent to the anticipated testimony of the witness on direct or cross examination, that party shall, at or before the time disclosure hereunder is required, submit to the opposing party a proposed redacted copy of the statement deleting the information which the party contends should not be disclosed, together with (A) notification that the statement or report in question has been redacted and (B) (without disclosing the contents of the redacted portions) a general statement of the basis for the redactions. If the opposing party is not satisfied with the redacted version of the statement so provided, the party claiming the right to prevent disclosure of the redacted material shall submit to the court for in camera review a complete copy of the statement at issue as

well as the proposed redacted version, along with a memorandum of law detailing the grounds for nondisclosure.

(6) *Motions Seeking Additional Discovery.* Subject to the provisions of paragraph (b)(8), the discovery mandated by paragraphs (b)(1), (b)(2), and (b)(4) of this rule shall be provided as a matter of course and without the need for making formal request or filing a motion for the same. No motion seeking discovery of any of the materials required to be disclosed by paragraphs (b)(1), (b)(2) or (b)(4) of this rule shall be accepted for filing by the clerk of court unless said motion contains a specific recitation of: (A) the particular discovery materials sought by the motion; (B) the efforts which the movant has made to obtain said materials from the opposing party without the need for filing a motion; and (C) the reasons, if any, given by the opposing party for refusing to provide such materials. Nonetheless, this rule does not preclude any party from filing motions to obtain additional discovery. Except with respect to witnesses or information first disclosed pursuant to paragraph (b)(4), all motions seeking additional discovery, including motions for a bill of particulars and for depositions, shall be filed within sixty calendar days if the case originated in Superior Court, or within forty-five calendar days if the case originated in Circuit Court – District Division after the defendant enters a plea of not guilty. Motions for additional discovery or depositions with respect to trial witnesses first disclosed pursuant to paragraph (b)(4) shall be filed no later than seven calendar days after such disclosure occurs.

(7) *Continuing Duty to Disclose.* The parties are under a continuing obligation to supplement their discovery responses on a timely basis as additional materials covered by this rule are generated or as a party learns that discovery previously provided is incomplete, inaccurate, or misleading.

(8) *Protective and Modifying Orders.* Upon a sufficient showing of good cause, the court may at any time order that discovery required hereunder be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing of good cause, in whole or in part, in the form of an ex parte written submission to be reviewed by the court in camera. If the court enters an order granting relief following such an ex parte showing, the written submission made by the party shall be sealed and preserved in the records of the court to be made available to the Supreme Court in the event of an appeal.

(9) *Sanctions for Failure to Comply.* If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may take such action as it deems just under the circumstances, including, but not limited to: (A) ordering the party to provide the discovery not previously provided; (B) granting a continuance of the trial or hearing; (C) prohibiting the party from introducing the evidence not disclosed; and (D) assessing costs and attorney's fees against the party or counsel who has violated the terms of this rule.